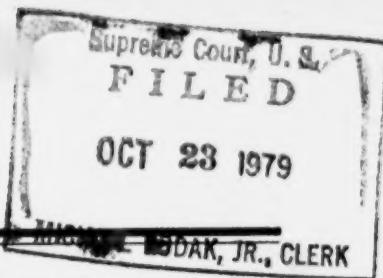


No. 79-216



In the Supreme Court of the United States

OCTOBER TERM, 1979

PETER V. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. McMURRAY
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 602 F.2d 131.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1979. The petition for a writ of certiorari was filed on August 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court erred in refusing to grant petitioners a new trial based on the claim that the government violated due process by failing to disclose certain documents to them.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on one count of conspiracy to commit mail fraud, 11 counts of mail fraud, and two counts of interstate travel with intent to promote bribery, in violation of 18 U.S.C. 371, 1341 and 1952. Petitioner Craig was sentenced to three years' imprisonment and a fine of \$5,000. Petitioner Pappas was sentenced to five years' imprisonment and a fine of \$10,000. The court of appeals affirmed (*United States v. Craig*, 573 F. 2d 455 (7th Cir. 1977)), and this Court denied certiorari, 439 U.S. 820 (1978). Thereafter, petitioners filed a motion for a new trial pursuant to Fed. R. Crim. P. 33, alleging that they had discovered certain new evidence. The district court denied that motion without opinion (Pet. App. B). The court of appeals affirmed (Pet. App. A).

The pertinent facts are summarized in the opinions of the court of appeals on direct appeal (573 F. 2d at 463-473) and on appeal from the denial of petitioners' motion for a new trial (Pet. App. 1-6). Briefly, the evidence showed that petitioners engaged in a scheme to bribe members of the Illinois General Assembly in order to obtain the passage of certain legislation. Petitioner Craig was one of the bribed legislators. Petitioner Pappas was a liaison employee in the office of the Illinois Secretary of State. The participants in the scheme planned to create a \$50,000 bribery fund—\$40,000 of which would be paid to the legislators and \$10,000 to petitioner Pappas. However,

only about \$30,000 was actually collected, of which petitioner Pappas received several thousand dollars before distributing the rest to the legislators.

The government's evidence at trial included the testimony of an informer, Pete Pappas (no relation to petitioner Peter V. Pappas),¹ and three intercepted conversations between informer Pappas and petitioners during which they discussed the bribery scheme. These recordings, made with the informer's consent, were authenticated by a government expert, Professor Marc Weis, who found no evidence of alteration. Weis also authenticated certain copies of the tapes that were made to improve audibility.² Informer Pappas testified that both the original tapes and the copies truly and accurately reflected his conversations with petitioners.

ARGUMENT

Pursuant to a post-trial request under the Freedom of Information Act, petitioners obtained certain log sheets used to record custody of the tapes introduced into evidence at trial. They also obtained three reports of postal inspectors describing their investigation of the case, as well as several items of correspondence. Petitioners contend (Pet. 10-19, 21-23, 27-29) that these documents should have been disclosed before trial under *Brady v. Maryland*, 373 U.S. 83 (1963), and that their discovery of this evidence entitles them to a new trial.

¹Pete Pappas was also a legislator. He cooperated in the investigation and pleaded guilty to reduced charges.

²The original tapes at trial were marked 101-0, 102-0, 103-0, and 104-0, and were described as the "Zero" series recordings. Tape 104-0 did not concern petitioners and was not used at trial. The copies made by the government's expert were marked 101-1 through 104-1.

We note at the outset that there is no claim here of knowing use of perjured testimony or of suppression of exculpatory evidence of a kind specifically requested by the defense at or prior to trial. Rather, as in *United States v. Agurs*, 427 U.S. 97 (1976), this is a case in which the government possessed information that the defense claims after trial should have been disclosed as exculpatory. As *Agurs* establishes, such claims are to be evaluated by the trial court on the basis of whether the evidence in question, considered in conjunction with all the facts and circumstances of the trial, creates a reasonable doubt regarding the defendants' guilt that would not otherwise exist (417 U.S. at 112). As both courts below correctly concluded, petitioners have wholly failed to demonstrate that this "newly discovered evidence" casts any doubt upon the validity of their convictions.

1. Petitioners first contend (Pet. 12-15) that the IRS log sheets obtained through their FOIA request (Pet. App. 23-31) show that the government's expert, who testified that the original tapes had not been altered, received only copies of the tapes and not the originals.

As the court of appeals correctly noted (Pet. App. 5), this contention was never raised in the district court and should not be raised for the first time on appeal. See, e.g., *United States v. Knuckles*, 581 F. 2d 305, 310 (2d Cir. 1978). In any event, the claim is without merit. The tapes that were introduced into evidence were examined by the government's expert in March 1976 for purposes of authentication (Tr. 1986-1987). While copies of the tapes had previously been made in 1974, the originals were given to the expert for examination 15 months later (Tr. 2026-2027; see also Tr. 2060). The notation in the logs that copies were made in 1974 does not suggest that the expert did not receive the original tapes in 1976.

Moreover, as the court of appeals held on direct appeal, the authenticity of the tapes was amply established by one of the participants in the conversations (Pete Pappas), who testified that the tapes were true and accurate recordings of the conversations in question (573 F. 2d at 478-479). Under these circumstances, the logs do not cast any doubt, reasonable or otherwise, upon petitioners' guilt.³

2. Petitioners also argue (Pet. 15-17) that a postal inspector's report dated October 25, 1973 (Pet. App. 14) shows that one of the tapes used at trial (Gov. Ex. 101-0) is inaccurate. The tape in question is a recording of a conversation between Pete Pappas and petitioners on September 27, 1973. Petitioners argue that the report refers to subjects of discussion that were not recorded on the tape in question, suggesting that the tape has been altered.

However, as the court of appeals pointed out (Pet. App. 3), the report of the postal inspector purports to reflect a "partial playback of copies of the tapes, and interview of Pete Pappas." During his interview with the postal inspectors after the original conversation, Pappas supplied additional information about those portions of the conversation that were "unintelligible" on the tapes. Under these circumstances, the court of appeals correctly concluded that the report did not suggest any alteration of the tape (*ibid.*):

³Petitioners' argument (Pet. 20) that the logs are Jencks Act statements is insubstantial. Although the logs were prepared under the supervision of an Assistant United States Attorney who testified at trial, the clerical entries in the logs were made by various other persons. None of the entries constitute witness statements under the Jencks Act. See 18 U.S.C. 3500(e).

When he was interviewed by the postal inspectors within a month of [the] conversation, [Pappas] was obviously able to supply the unintelligible portions, which accounts for the postal report containing some information not heard on the recording admitted in evidence.

Moreover, since the additional material contained in the postal report is inculpatory, not exculpatory, such material could not create a reasonable doubt as to petitioners' guilt. *Ibid.*

3. Petitioners also contend that a postal inspectors' report dated October 18, 1973, reveals that two of the intercepted conversations used at trial were recorded not only by a device on the informer's body, but also by a receiver operated by federal agents. They argue that the "backup" tapes obtained through use of the receiver were not disclosed and might have been used by them at trial to impeach the integrity of the original tapes (Pet. 13, 23-25).

However, the government produced an affidavit prior to trial describing the electronic surveillance used in the investigation (Pet. App. 4). Attached to that affidavit was a letter stating that petitioners' conversations were both "monitored and recorded." During the cross-examination of informer Pappas at a pre-trial suppression hearing (Tr. 384-386), defense counsel also confirmed the possibility that the conversations in question were monitored by a federal agent in an adjoining hotel room. In addition, all of the original tape recordings in the government's possession, including recordings that were not going to be used at trial, were made available to the defense for inspection prior to trial. Tr. 1996-1998; see also the government's "Statement of Continuing Availability of Tape Recorded Conversations," filed in the district court.

Accordingly, the existence of these tapes does not constitute newly discovered evidence withheld by the prosecution at trial.

Moreover, petitioners have made no showing that the "backup" tapes differ from the originals; nor have they suggested any ground for concluding that the duplicate tapes could create a "reasonable doubt" as to their guilt. See *United States v. McCrane*, 575 F. 2d 58, 61 (3d Cir. 1978). Because the tapes were made available to petitioners before trial and were not exculpatory, the courts below properly declined to grant petitioners a new trial on this basis. See *United States v. Ruggier*, 472 F. 2d 599, 604-605 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Riley*, 530 F. 2d 767, 771 (8th Cir. 1976).⁴

4. Petitioners also argue that a postal inspector's report dated August 31, 1973 (Pet. App. 8) reveals that the inspector and an Assistant United States Attorney interviewed James McBride, who died before commencement of the trial. According to the postal inspector's report, McBride stated that petitioner Pappas made no attempt to influence him or prevent him from testifying (Pet. App. 9-10). Petitioners argue that this statement would have been helpful in rebutting the assertion at trial that Pappas had attempted to influence certain witnesses (Pet. 18-19).

⁴*United States v. Poole*, 379 F. 2d 645 (7th Cir. 1967), relied on by petitioners, is not relevant here. In contrast to the situation in *Poole*, the government did nothing to mislead petitioners or prevent them from inspecting the duplicate "backup" tapes.

The postal inspector's report, however, was not material to the issues presented at trial. Petitioners were not indicted for attempting to influence witnesses. Moreover, as noted by the court of appeals, the "fact that Peter V. Pappas did not try to influence McBride on August 28 is a negative fact and has no bearing on other evidence that he attempted to influence other people at other times" (Pet. App. 5). Finally, the statement of McBride was inadmissible hearsay and could not have been used by petitioners in their defense at trial.

Nor was the Jencks Act violated by the government's failure to produce the postal inspector's report. The Jencks Act only requires the production of prior statements of witnesses. See 18 U.S.C. 3500. McBride, whose statement was summarized in the report, was not a witness at trial. And while it is true that the Assistant United States Attorney who participated in the McBride interview was a witness at trial, the report in question contains no statement made by him.⁵

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. McMURRAY
Attorney

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⁵Petitioners also argue that a new trial is required because the agents involved in the investigation failed to comply with the Attorney General's guidelines governing consensual interception of conversations (Pet. 31). In accepting the government's contention that emergency conditions required interception without prior approval by the Attorney General, the court of appeals found substantial compliance with the guidelines "in all respects" (Pet. App. 6). Furthermore, *United States v. Caceres*, No. 76-1309 (Apr. 2, 1979), establishes that failure to comply with internal guidelines will not invalidate an interception of conversations if the interception is consistent with applicable statutory and constitutional provisions. As noted in *Caceres*, neither the Fourth Amendment nor 18 U.S.C. 2510 *et seq.* (the federal wiretap statute) forbids interception of conversations where one party to the conversations gives his consent. Slip op. 8-9.